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The law of transboundary aquifers

The law of transboundary aquifers

Report of the Secretary-General

Summary

The present report, prepared pursuant to General Assembly resolution 66/104, contains comments and observations of Governments on the draft articles on the law of transboundary aquifers.

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I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 66/104, in which the Assembly decided to include in the provisional agenda of its sixty-eighth session the item entitled "The law of transboundary aquifers", and in the light of written comments of Governments, as well as views expressed in the debates of the Sixth Committee held at its sixty-third and sixty-sixth sessions, to continue to examine, inter alia, the question of the final form that might be given to the draft articles on the law of transboundary aquifers adopted by the International Law Commission.

2. The Secretary-General, in a circular note dated 28 December 2011, drew the attention of Governments to the resolution, and a reminder was sent out on 21 January 2013.

3. The present report should be read together with the previous report of the Secretary-General (A/66/116 and Add.1).

II. Comments and observations received from Governments

Chile

4. Chile reiterated the information contained in its previous submission (see A/66/116/Add.1, paras. 1-3). It also noted that discussions on the law of transboundary aquifers should be based on scientifically validated knowledge.

Cuba

5. Cuba stated that it supported the creation of regional and bilateral agreements between States as a means to solve conflicts arising from transboundary aquifers. Moreover, in the light of the close relationship between surface and subterranean watersheds, as well as the characteristics of the hydrological cycle, transboundary aquifers should be analysed together with transboundary watercourses.

El Salvador

6. El Salvador recalled that, in the outcome document of the United Nations Conference on Sustainable Development (General Assembly resolution 66/288, annex, paras. 119-124), it was recognized that "water is at the core of sustainable development as it is closely linked to a number of key global challenges", such as poverty eradication, sanitation and food security, and, in that connection, noted that it was essential that States helped to ensure the protection of aquifers by taking appropriate measures designed to prevent harm to their intrinsic vulnerability, in addition to harm caused by various external factors, including pollutants and overuse.

7. For El Salvador, it was essential to strike a proper balance between rights and obligations, recognizing both States' sovereignty over the natural resources located within their territory and the existence of certain restrictions which, in that case,

arose from, among others, the nature and capacity of the aquifer or aquifer system itself, current and future needs and the effects of aquifer use.

8. In the light of the urgent need to protect such water resources, El Salvador noted the significant progress on the topic of transboundary aquifers that had been achieved within the framework of the United Nations in recent years as contained in General Assembly resolution 63/124, in which the Assembly had taken note of the final text of the draft articles adopted by the Commission.

9. Recalling its previous comments (see A/66/116, paras. 41-49), El Salvador noted that the draft articles rightly included obligations in line with the development of international environmental law, such as the obligations of prevention, monitoring and proper management. Moreover, given that those were primary obligations, they should be supplemented by norms relating to State responsibility, either for internationally wrongful acts or for liability for lawful acts that caused significant environmental damage. Such norms had been developed by the Commission and were widely recognized in international law.

10. With regard to the final form of the articles, El Salvador noted that it was clear that the adoption at the international level of binding norms to regulate the use of aquifers and prevent their destruction represented one way of ensuring the protection of water resources. The elaboration of an international convention on the matter should therefore not be categorically dismissed. El Salvador remained flexible as to the final form of the draft articles but found it necessary to reiterate that the debate should focus on choosing the form most conducive to genuine protection of transboundary aquifers in the light of their importance to all humankind.

Finland

11. Finland attached great importance to the worldwide promotion of the sustainable use and protection of aquifers. According to current research, climate change and its effects were further accentuating the importance of reserves of fresh water, and especially clean groundwater, as a particularly valuable natural resource in the future. Currently, many densely populated areas already consumed groundwater reserves faster than new ones were being formed. For Finland, given that many aquifers crossed State borders, their protection and use should be agreed upon by the States concerned.

12. Accordingly, it would be logical to draft an international convention on the basis of the draft articles. In addition, mutual and bilateral cooperation should be encouraged, and bilateral and regional treaties, plans and other forms of cooperation between bordering countries should be emphasized as a means to regulate the protection and use of water resources in more detail. The differences in natural conditions, culture, economy and legislation that prevailed between States could be more effectively taken into account in bilateral rather than multilateral agreements.

13. Finland had concluded bilateral agreements on frontier waters with Norway, the Russian Federation and Sweden, but they covered only surface waters. Finland was also a party to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, concluded in 1992, which was based on the same principles of international water law as the draft articles currently under

consideration. From its experience drawn from the implementation of those agreements, Finland was of the opinion that the draft articles could also contribute to the protection and collective use of aquifers.

14. In the view of Finland, it would, however, be desirable to include in an eventual new convention an institutional mechanism to advance the operation of the convention. Finland also noted that the obligation set out in draft article 4 (c) to establish a comprehensive utilization plan might be disproportionate when a transboundary aquifer was not used or required no protection for other reasons.

15. Finland also emphasized the role of preventive measures as an essential form of aquifer risk management. Existing risk factors should be identified and the measures needed to prevent the realization of those risks implemented. For that reason, Finland recommended including provisions in the draft articles that underlined preventive measures. Moreover, it would be advisable to include provisions that acknowledged the effects of current and future environmental threats to the quality and volume of groundwater reserves, in addition to means of adapting to those effects.

Iraq

16. Iraq suggested that the term "transboundary aquifer" should be replaced by the term "shared aquifer".

17. In addition, Iraq observed that, in view of the close connection between matters addressed by the Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 and any draft framework on the law of transboundary aquifers that might be adopted, there should be further discussion in order to achieve an acceptable formulation.

18. Iraq also asserted that developing countries needed support in order to ensure that their transboundary aquifers were not overexploited or polluted. It suggested that the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO) should be requested to offer further assistance in implementing the draft articles to States seeking to conclude bilateral or regional agreements.

Japan

19. Japan expressed its sincere appreciation to the International Law Commission for its valuable work on the law of transboundary aquifers, including its adoption of the draft articles and the detailed commentaries thereto.

20. It emphasized the importance of the proper management of aquifers, noting that demand for fresh water had dramatically increased in many places, in particular in areas of rapid socioeconomic development caused by significant population growth. It also stressed that much fresh water was located in aquifers, which frequently stretched across national boundaries. The need for mechanisms for their proper management notwithstanding, a number of transboundary aquifers had been heavily overexploited, seriously depleted and damaged by pollution. Accordingly, it was urgent to develop legal instruments to regulate the use of transboundary aquifers in order to attain the common goal of sustainable development.

21. From that standpoint, the draft articles provided a valuable platform for States concerned with the establishment of bilateral or regional frameworks to manage their particular aquifer systems. In the first place, the draft articles, in the view of Japan, adequately reflected a wide range of State practice and accurately described established practice in the field. The elaboration of the draft articles had also been well supported by scientific evidence, given that UNESCO had provided valuable scientific and technical expertise to the Commission in that elaboration. Furthermore, the draft articles set out the essential elements of a possible legal framework and served as a common basis for the negotiation of bilateral and regional conventions. For example, the Agreement on the Guaraní Aquifer had been drafted with due regard for the draft articles. Japan also noted that the General Assembly, in its resolutions 63/124 and 66/104, had encouraged the States concerned to make appropriate arrangements for the management of their transboundary aquifers, taking into account the provisions of the draft articles.

22. With regard to their final form, Japan noted that, at the sixty-third and sixty-sixth sessions of the General Assembly, held in 2008 and 2011, respectively, the vast majority of States had given favourable consideration to the draft articles. Nevertheless, the Assembly had not reached a conclusion regarding the issue. Considering the importance and urgency of the law of transboundary aquifers, Japan believed that the sixty-eighth session of the Assembly would afford a desirable opportunity to reach a conclusion on the question. Japan suggested that, if some Member States continued to find difficulty in immediately adopting the draft articles as an international convention, consideration should be given to the possibility of declaring the draft articles as guiding principles for bilateral, regional and other forms of arrangements for the proper management of transboundary aquifers.

Kuwait

23. Kuwait noted that, in the arid environment in which it was located, there was no surface water and the usable groundwater was either limited or overexploited. That state of affairs necessitated effective management of its transboundary aquifers, including the Dammam Limestone Formation and the Kuwait Group aquifer system, the major recharge zone of which was located in Saudi Arabia and the discharge zone of which extended along the coastal parts of Kuwait and the lower parts of the Shatt al-Arab valley in Iraq.

24. To ensure the effective sustainable management of its transboundary aquifers, Kuwait had identified a number of necessary measures. First, a comprehensive and cooperative hydrological evaluation of the aquifer systems in neighbouring States was essential to assessing the long-term sustainability and water quality of the aquifers in the region. Second, it was vital that the States in the region managed brackish groundwater resources cooperatively in order to enable their sustainable use, preservation and protection. Moreover, Kuwait would make all efforts to formulate bilateral and regional agreements with neighbouring States in relation to transboundary aquifers. In that effort, it might seek the assistance of the UNESCO Internationally Shared Aquifers Resources Management Programme.

25. For Kuwait, the draft articles on the law of transboundary aquifers, and their commendation to the attention of Governments by the General Assembly, represented a timely step in supporting the effective management of transboundary

aquifers. It hoped that the draft articles would soon be adopted, taking into consideration the viewpoints of all stakeholders concerned. Kuwait also looked forward to using the draft articles in its efforts to reach mutual understandings with neighbouring States.

Morocco

26. Morocco noted that, given that it was in possession of a major aquifer system spread between the east and north of the country, part of which was shared with Mauritania and Algeria, it had made considerable efforts to protect and preserve its groundwater resources. Those efforts were reflected in the adoption of Act No. 10-95 and its implementing provisions, which constituted a general framework of regulations governing all bodies of water, both surface water and groundwater, and defined them as falling within the public domain of the State. In addition, Morocco said that it had acceded to the Convention on the Law of the Non-navigational Uses of International Watercourses on 13 April 2011.

27. Morocco considered the adoption of resolution 66/104 and the desire for an international legal framework relating to the law of transboundary aquifers to be of undeniable importance. Besides promoting rational management, those initiatives helped to strengthen measures adopted at the national level on the topic and encouraged the States concerned to make the bilateral or regional arrangements necessary for the proper management of their transboundary aquifers.

28. In the view of Morocco, the question of transboundary aquifers undoubtedly pertained to permanent sovereignty over natural resources, in accordance with General Assembly resolution 1803 (XVII), as was recalled in the third preambular paragraph of the draft articles. In that context, international cooperation on transboundary aquifers would not be confined only to the criteria of the rational and sustainable use of such aquifers and the obligation of each State not to cause harm to the groundwater resources of other States, but also would be concerned with respect for the sovereign rights of each State relating to the management, control and use of its aquifers throughout its territory.

Portugal[1]

29. Portugal observed that the subject of transboundary sharing of water was extremely relevant and particularly complex in the modern world. It was relevant for development. It also had political and economical importance. At the same time, there was potential conflict inherent in shared waters, as well as environmental considerations relating thereto.

30. Portugal expressed the belief that the draft articles on the topic could provide a positive contribution to the proper management of the existing transboundary aquifers around the world and thence to the promotion of peace. In that context, Portugal underlined the need for the inclusion in the draft articles of a reference to the human right to water and of principles of international environmental law.

[1] For previous comments of Portugal, see A/66/116, paras. 90 and 91.

31. Portugal noted that, overall, the solutions presented in the draft articles were well balanced and in line with contemporary international law. In that connection, it noted that there were some similarities between the articles on the law of transboundary aquifers with the articles of the Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 and with the United Nations Convention on the Law of the Sea. It also observed that the draft articles were compatible with the European Union law on the matter that already applied to Portugal, namely directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the Water Framework Directive) and directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration. The existence of specific European Union law applicable to the subject matter should not prevent States members of the European Union, including Portugal, from contributing to the development and universal codification of the law of transboundary aquifers. In that regard, Portugal reaffirmed its belief that the articles should evolve into an international framework convention.

Spain[2]

32. Spain noted that it had the legal and technical instruments necessary to ensure cooperation for the proper management of transboundary aquifers. Cooperation with neighbouring countries, namely Portugal, France and Andorra, was seamless and helped to resolve potential problems or conflicts in the management of shared surface-water and groundwater resources.

33. It had concluded with Portugal, for example, the Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (the Albufeira Agreement). The Agreement, which had been signed on 30 November 1998 and had entered into force in 2000, was aimed at enabling cooperation between the two countries for the protection of surface water and groundwater, in addition to the aquatic and terrestrial ecosystems that were directly dependent thereon, and for the sustainable use of the water resources of the Miño Sil, Duero, Tajo and Guadiana river basins. It was also designed to protect the good status of the water (including groundwater) and to promote water-use activities that had or were likely to have transboundary effects. It further allowed for the adoption of measures to mitigate the impact of floods and droughts.

34. In an effort to achieve the goals of the Agreement, Spain and Portugal had agreed to implement the following cooperation mechanisms: regular and systematic exchange of information; consultations and activities within the organs of the Agreement (the Conference of the Parties and the Commission for the Implementation and Development of the Albufeira Agreement); and individual or joint adoption of technical, legal, administrative or other measures needed for the implementation and development of the Agreement. The Agreement further provided for the establishment of joint or coordinated communication systems for the transmission of alert and emergency information, which allowed for the adoption of appropriate preventive or corrective measures.

[2] For previous comments of Spain, see A/66/116, paras. 110 and 111.

35. Spain recalled that, while shared aquifers existed, transboundary water bodies had not been contemplated in the definition of groundwater bodies developed during the first hydrological planning cycle of the Water Framework Directive. The most relevant transboundary aquifers were found in the former hydrogeological units of Bajo Miño, Ciudad Rodrigo-Salamanca, Moraleja and Vegas Bajas, located in the Miño-Sil, Duero, Tajo and Guadiana river basins, respectively. The surface area of the four hydrogeological units amounted to some 5,000 km^2, more than 4,000 km^2 of which was represented by the river basin of Ciudad Rodrigo-Salamanca. That river basin had an estimated volume of renewable resources of less than 150 hm^3 per year, the largest segment of which corresponded to the alluvial aquifers connected directly to surface watercourses.

36. Spain also provided information on an administrative agreement with France on water management (the Toulouse Agreement), which regulated the sustainable and integrated management of transboundary watercourses between Spain, France and Andorra. The transboundary aquifers of those countries were located in the former hydrogeological units of Larra and La Cerdanya, in the Ebro river basin. Those were stand-alone aquifers, with a carbonated and mixed lithology, respectively, and with surface areas of 62.70 km^2 and 245.49 km^2, respectively. Just as the shared transboundary aquifers between Spain and Portugal, the shared transboundary aquifers between Spain, France and Andorra were of limited significance. Consequently, in the current case, there was no specific bilateral agreement regulating the law of transboundary aquifers between the States. There was, however, a transboundary technical committee that ensured mutual understanding between the parties and the entire process had been characterized by good coordination and consultation.

37. Overall, Spain considered that the current framework of international cooperation with Portugal and with Andorra and France upheld the law of transboundary aquifers and was in accordance with paragraphs 1 to 3 of General Assembly resolution 66/104.

United States of America[3]

38. The United States continued to believe that the Commission's work on transboundary aquifers constituted significant progress in providing a possible framework for the reasonable use and protection of underground aquifers, which were playing an increasingly important role as water sources for human populations. For all States, and especially those struggling to cope with pressures on transboundary aquifers, the Commission's efforts to develop a set of flexible tools for using and protecting those aquifers had been a very useful contribution.

39. Nevertheless, there remained much to learn about transboundary aquifers in general and specific aquifer conditions, with State practices varying widely. Moreover, the draft articles, of which the General Assembly had taken note in resolution 63/124 and discussed in connection with resolution 66/104, went beyond current law and practice. For those reasons, the United States continued to believe that context-specific arrangements, as opposed to a global framework treaty, provided the best way to address pressures on transboundary groundwater. As

[3] For previous comments of the United States, see A/66/116, paras. 116-118.

decided by the Assembly in its resolutions 63/124 and 66/104, States concerned should take into account the provisions of the draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers. Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; current uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. Maintaining the articles in their current draft form was suitable for those purposes.

40. The United States remained unconvinced that, if the draft articles were fashioned into a global treaty, the treaty would garner sufficient support or would be necessary. It recognized, however, that many States had expressed an interest in such a framework convention. If the draft articles were to take the form of a treaty, a number of important issues would need to be addressed. For example, appropriate final articles for a convention would need to be developed, in addition to articles that established the relationship between the proposed convention and other bilateral or regional arrangements. In particular, care would need to be taken not to either supersede existing bilateral or regional arrangements or to limit the flexibility of States entering into such arrangements.